

F. DUANE BLAKE ET AL.
v.
BUREAU OF LAND MANAGEMENT

IBLA 96-155

Decided August 6, 1998

Appeal of an order issued by Administrative Law Judge James H. Heffernan dismissing grazing appeals for lack of jurisdiction. AZ-010-95-01 through AZ-010-95-13.

Affirmed.

1. Administrative Practice--Administrative Procedure:
Administrative Review--Appeals: Jurisdiction--Board
of Land Appeals--Delegation of Authority--Endangered
Species Act of 1973: Generally--Endangered Species
Act of 1973: Section 7: Consultation--Fish and
Wildlife Service--Office of Hearings and Appeals--Rules
of Practice: Appeals: Jurisdiction

The issuance of a biological opinion does not deprive an Administrative Law Judge or this Board of jurisdiction over a grazing appeal under 43 U.S.C. § 315h (1994) with respect to issues not within the scope of the biological opinion. Therefore, this Board has the jurisdiction to determine whether dismissal of the appeal for lack of jurisdiction was correct, because whether OHA has jurisdiction under the Taylor Grazing Act is not within the scope of a biological opinion.

2. Administrative Practice--Administrative Procedure:
Administrative Review--Appeals: Jurisdiction--Board
of Land Appeals--Delegation of Authority--Endangered
Species Act of 1973: Generally--Endangered Species
Act of 1973: Section 7: Consultation--Fish and
Wildlife Service--Office of Hearings and Appeals--Rules
of Practice: Appeals: Jurisdiction

The Office of Hearings and Appeals does not have the authority to review a biological opinion issued by the Fish and Wildlife Service under section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1994), or BLM's implementation of the mandatory terms and conditions of an incidental take statement attached to that opinion.

3. Administrative Practice--Administrative Procedure:
Administrative Review--Appeals: Jurisdiction--Board
of Land Appeals--Office of Hearings and Appeals--
Rules of Practice: Appeals: Jurisdiction

Except for a few specific circumstances, the Board of Land Appeals will not entertain an appeal when no effective relief can be afforded an appellant. A well-recognized exception to this rule is that the Board will not dismiss an appeal when an issue raised by the appeal is capable of repetition, yet evading review.

4. Federal Land Policy and Management Act of 1976: Grazing
Leases and Permits--Grazing and Grazing Lands--Grazing
Permits and Licenses: Cancellation or Reduction

When BLM is formulating the Federal action it contemplates taking in accordance with the Taylor Grazing Act, and the Federal action requires a biological evaluation pursuant to the ESA, BLM must seek input from affected permittees and lessees and the interested public. Following receipt of this input, a proposed decision setting out Federal action which would necessitate a change in the terms and conditions of a Taylor Grazing Act permit or lease must be served on the affected permittees and lessees, who should be given an opportunity to protest. If a protest is filed, the authorized officer must reconsider the proposed decision in light of the protestant's statement of reasons for protest and other information pertinent to the case. At the conclusion of the review of the protest, the authorized officer must serve the final decision on the protestant and the interested public, and BLM must afford an opportunity for an appeal, as provided in 43 C.F.R. § 4160.3(c).

APPEARANCES: Karen Budd-Falen, Esq., and Daniel B. Frank, Esq., Cheyenne, Wyoming, for Appellants; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; Deborah S. Reames, Esq., San Francisco, California, and Joseph J. Brecher, Esq., Oakland, California, for Applicant-Interveners. 1/

1/ On Feb. 15, 1996, the Desert Protective Council, Desert Tortoise Preserve Committee, Natural Resources Defense Council, and Sierra Club filed an unopposed motion to intervene in this case, indicating, among other things, that they intended to follow the briefing schedule already established. However, the briefing in this appeal has long been concluded and no brief has been filed on their behalf, nor have they otherwise participated in this appeal. We therefore deny their motion to intervene.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

F. Duane Blake et al. (Appellants) 2/ have appealed Administrative Law Judge James H. Heffernan's November 30, 1995, order granting a Bureau of Land Management (BLM or Bureau) motion to dismiss the Appellants' appeals of 13 grazing decisions for lack of jurisdiction. The appealed decisions had been issued on August 11, 1995, by the Area Manager, Shivwits Resource Area, Arizona Strip District, BLM.

In a memorandum dated September 8, 1994, the Fish and Wildlife Service (FWS or Service) asked BLM to reinitiate consultation concerning cattle grazing in desert tortoise habitat within the Shivwits Resource Area, in accordance with section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1994), and 50 C.F.R. § 402.16. The Service considered renewed consultation necessary because BLM decisions implementing the February 21, 1992, biological opinion issued after the original consultation had been stayed on appeal, thereby preventing BLM from implementing and applying the mandatory terms and conditions for reducing incidental take of desert tortoises set out in the 1992 opinion. The FWS request specifically noted the requirement in the 1992 opinion that cattle were to be removed from category 1 and 2 desert tortoise habitat between March 15 and June 1. The Service also suggested that the stay had left the desert tortoise vulnerable to cattle grazing during the 1992, 1993, and 1994 spring grazing seasons and had exposed the Appellants to civil and criminal liability for unpermitted take of a threatened species. 3/

On May 1, 1995, BLM renewed section 7 consultation by submitting a Biological Evaluation of livestock grazing on the Arizona Strip District desert tortoise habitat. In its submittal, BLM asked the Service to evaluate a proposed management action which included limiting the season of livestock grazing use of the lands identified as category 1 and 2 desert

2/ The Appellants include: F. Duane Blake (Highway Allotment, AZ-010-95-01); JEL Development (Mormon Well Allotment, AZ-010-95-02); C. Judd Burgess (Mormon Well Allotment, AZ-010-95-03); DeMar Limited (Mormon Well Allotment, AZ-010-95-04); Black Rock Cattle Company (Cedar Wash Allotment, AZ-010-95-05, and Beaver Dam Slope Allotment, AZ-010-95-06); Grant Hafen (Beaver Dam Slope Allotment AZ-010-95-07); Marion Graf (Beaver Dam Slope Allotment, AZ-010-95-08); Shelby Frei (Beaver Dam Slope Allotment, AZ-010-95-09); Landon Frei (Beaver Dam Slope Allotment, AZ-010-95-10); J. Claude Frei and Sons (Beaver Dam Slope Allotment, AZ-010-95-11); and Bruce and Pam Jensen (Mesquite Community Allotment, AZ-010-95-12, and Littlefield Community Allotment, AZ-010-95-13).

3/ This is not the first time that a threat of criminal sanctions has been mentioned. In Lundgren v. Bureau of Land Management, 126 IBLA 238, 241 (1993), counsel for BLM intimated that both the administrative law judge and members of this Board were subjecting themselves to criminal sanctions by imposing a stay.

tortoise habitat to a period commencing no earlier than October 16 and running no later than March 15. The proposed management action also included allowing temporary nonrenewable extensions of the grazing season when more than 280 pounds of dry weight annuals per acre were or were likely to be available, and restricting utilization on key forage species to 45 percent. See BLM Answer, Ex. L at ii.

On June 23, 1995, FWS issued its "Biological Opinion for the Reinitiation of Consultation on Proposed Livestock Grazing in Desert Tortoise Habitat on the Arizona Strip District" (BLM Answer, Ex. K), concluding that if the action proposed by BLM were to be taken, the proposed action was not likely to jeopardize the continued existence of the desert tortoise and was not likely to destroy or adversely modify critical desert tortoise habitat. As part of the incidental take statement included in the Biological Opinion, FWS identified mandatory reasonable and prudent measures it deemed to be necessary and appropriate to minimize the incidental take authorized by the Opinion and the nondiscretionary terms and conditions necessary to implement each of the mandatory measures. Mandatory reasonable and prudent measure number two directed BLM to minimize contact and forage overlap between cattle and desert tortoises. (Biological Opinion at 36.) The conditions required to implement mandatory measure number two included:

a. For the period of March 15 to October 15, the Bureau shall remove all livestock from any category 1 or 2 habitats in which spring annual plant production does not reach, or is predicted through weather modeling, not to reach 280 pounds per acre dry weight. One or more ephemeral extensions in 30-day increments may be authorized when more than 280 pounds per acre of dry weight forage are produced. This term and condition shall also apply to category 3 desert tortoise habitat in the Beaver Dam Slope allotment, the Cottonwood Wash Pasture of the Cottonwood allotment, category 3 habitat on the Virgin Slope of the Littlefield Community and Mesquite allotments, and category 3 habitat in Grand Wash of the Mud and Cane allotment.

b. The Bureau shall stock livestock at densities that will not risk decreasing the dry weight of spring annuals, as a result of forage consumption by cattle, below approximately 54 pounds per acre in category 1 and 2 habitats from March 15 to June 1.

* * * * *

d. Livestock utilization shall not exceed 45 percent of key forage species in desert tortoise habitat. Livestock shall be removed when utilization reaches 45 percent. Utilization shall not be averaged over time or between pastures or between species.

(Biological Opinion at 39.)

Upon the conclusion of the formal section 7 consultation, the Shivwits Resource Area Manager issued 13 separate grazing decisions, dated August 11, 1995, canceling existing grazing permits and simultaneously

issuing new permits, effective October 16, 1995. 4/ The decisions revised grazing authorizations and active preferences and imposed new terms and conditions modifying the authorized grazing use. The pertinent terms and conditions designed to implement the mandates of the Biological Opinion prohibited livestock grazing between March 15 and October 15 on public lands identified as category 1 and 2 desert tortoise habitat. Grazing was also restricted on any category 3 habitat (not suitable for desert tortoise) incapable of being managed separately from category 1 and/or 2 habitat. The new permits authorized nonrenewable extensions in 30-day increments up to May 31 when more than 280 pounds per acre dry weight ephemeral vegetation was produced or was likely to be produced based on winter/spring precipitation, but provided that no extensions would be authorized if livestock use would cause the available ephemeral vegetation to drop below 54 pounds per acre. The amended language also limited average forage utilization levels on key plant species to no more than 45 percent.

The Appellants appealed the Area Manager's decisions to an administrative law judge pursuant to 43 C.F.R. §§ 4160.4 and 4.470. On appeal they challenged BLM's adoption of the threshold figure of 280 pounds per acre of annual forage production claiming that the limitation was arbitrary, failed to consider perennial forage upon which grazing preferences and allotment carrying capacity were based, and stemmed from unrealistic data and mathematical formulas not representative of sound biological research or range management. They also contended that no studies established that reducing active livestock grazing would benefit the desert tortoise, and that BLM data actually indicated that the proposed management for the desert tortoise would not significantly change plant abundance or composition. They further asserted that differences in the preferred habitat of livestock and desert tortoises minimized the competition between the animals. 5/

The Bureau responded by filing a motion to dismiss the appeals for lack of jurisdiction. Specifically, BLM argued that the Secretary's memoranda issued on January 8 and April 20, 1993, explicitly stated that the Office of Hearings and Appeals (OHA) had no authority to review biological opinions issued by FWS under section 7 of the ESA or to "second guess" a biological opinion in the guise of reviewing a BLM decision implementing either a reasonable and prudent alternative set out in the opinion or the mandatory terms and conditions of an incidental take statement attached to the opinion. Noting that the terms and conditions incorporated into

4/ These decisions vacated and replaced previous decisions dated July 14, 1995, which had incorrectly given the effective date as Oct. 16, 1996.

5/ The Appellants also objected to the term and condition contained in the biological opinion directing BLM not to authorize construction of new livestock waters in category 1 or 2 desert tortoise habitat because it precluded a management alternative which would benefit the desert tortoise.

That term, however, was not included in the specific terms and conditions for the new grazing permits.

the new permits tracked the mandatory terms and conditions set out in the incidental take statement, BLM asserted that the appeals were actually challenges to the FWS incidental take statement and therefore beyond the purview of OHA's jurisdiction.

The Appellants opposed BLM's motion to dismiss, arguing that the Secretary's memoranda did not preclude OHA review of BLM actions taken pursuant to the grazing regulations and section 7 of the ESA. They asserted that they had no quarrel with the FWS Biological Opinion, and characterized their appeals as challenges to BLM's decision to propose the spring grazing limitations in its Biological Evaluation and subsequent adoption of those limitations in the final grazing decisions. They maintained that it was not the FWS, but was BLM that had devised the grazing limitations, and that FWS did no more than incorporate the BLM limitations as mandatory terms and conditions in the incidental take statement. They concluded that the mere fact that FWS adopted the restrictions proposed in the Biological Evaluation did not prevent them from challenging the Biological Evaluation.

Judge Heffernan acted upon BLM's motion to dismiss for lack of jurisdiction by issuing his November 30, 1995, order. He first stated his determination that he would be required to substantively review the mandatory terms and conditions of the FWS incidental take statement to render a decision on the appeals and that the Secretary's memoranda specifically stated that OHA was not to perform that task. He then rejected the Appellants' argument that the procedural background of the cases controlled the jurisdictional issue, finding that the alleged procedural irregularities, including the claim that the flaws in the FWS Biological Opinion arose from the spring grazing limitations developed by BLM as the only alternative presented for section 7 consultation, were irrelevant to the jurisdictional issue. Judge Heffernan further noted that reviewing the Appellants' contentions that FWS had merely adopted the grazing reductions advocated by BLM would require him to scrutinize facets of the FWS administrative record, an action which he had no power to undertake. Accordingly, he concluded that any procedural failures in the preparation and issuance of the BLM Biological Evaluation did not affect the jurisdictional constraints set out in the Secretary's memoranda. Finding that he lacked jurisdiction to afford the relief the Appellants were seeking, he dismissed the appeals.

On appeal, the Appellants contend that the Secretary's memoranda do not prohibit OHA from reviewing and ruling on the propriety of BLM's decision to submit a Biological Evaluation to FWS, to implement an FWS Biological Opinion, or to modify BLM action for which a Biological Opinion exists because these functions fall exclusively within BLM's authority, regardless of the existence of a Biological Opinion. They assert that BLM must comply with all applicable laws when engaging in section 7 consultation, including the grazing laws and that, therefore, OHA has jurisdiction under the grazing regulations to review BLM's actions in developing the proposed action to be submitted to FWS. The Appellants submit that BLM's attempt to deny them their statutory rights to a hearing by invoking the section 7 consultation requirements should fail because the jurisdictional constraints outlined in the Secretary's memoranda do not foreclose OHA from determining if the FWS Biological Opinion simply adopted the grazing reductions proposed

by BLM. Nor, the Appellants maintain, do the Secretary's memoranda preclude OHA from examining BLM's actions before and after issuance of the Biological Opinion, holding those actions unlawful, and directing development of a revised proposed action. The Appellants insist that the grazing laws and regulations grant them a right to a hearing on the merits to determine the legitimacy of the Biological Evaluation and to an appropriate remedy. 6/

In its Answer, BLM argues that Judge Heffernan correctly found that OHA had no jurisdiction to hear these appeals because the Secretary's January 8 and April 20, 1993, memoranda unequivocally state that OHA's delegated authority does not extend to disputes involving section 7 of the ESA. The Bureau denies that OHA's lack of jurisdiction deprives the Appellants of due process, noting that under 16 U.S.C. § 1540(g) (1994), FWS biological opinions may be appealed to the Federal district court. The Bureau contends that the Appellants' depiction of their appeals as challenges to BLM's Biological Evaluation, not the FWS Biological Opinion, must be rejected. The Bureau avers that Appellants' objections to the scientific data underlying the Biological Evaluation should have been presented to FWS during the consultation period leading to the issuance of the Biological Opinion. Because the terms and conditions imposed in the grazing permits mirror the mandatory terms and conditions included in the incidental take statement, BLM maintains that OHA cannot grant the relief sought by the Appellants without disturbing FWS' findings and conclusions, something it has no authority to do. Despite OHA's jurisdiction over grazing decisions, BLM submits that the Secretary's memoranda specifically prohibit the use of grazing appeals as a means of circumventing the jurisdictional limitation on OHA's authority to review FWS section 7 determinations. On this basis, BLM concludes that Judge Heffernan properly dismissed the appeals for lack of jurisdiction.

[1] Judge Heffernan dismissed the appeals for lack of jurisdiction based on the jurisdictional limitations contained in memoranda issued by the Secretary on January 8 and April 20, 1993. The primary issue before us is whether the administrative law judge and this Board have jurisdiction to grant the relief the Appellants seek, in light of the fact that the BLM underlying decisions are in response, in whole or in part, to an FWS section 7 determination. In Lundgren v. Bureau of Land Management, *supra*, at 248, we noted that "issuance of a biological opinion does not deprive an

6/ In support of their argument that they are entitled to a remedy, the Appellants attempt to adopt the statement of reasons they filed in another appeal currently pending before the Board. That document is not part of the record in this case and was not been served on counsel appearing for BLM in this appeal. If a party wishes to adopt portions of a document filed in another appeal, the party must furnish a copy of that document for the record and serve it on all parties. Therefore, even if the remedy issue were pertinent to resolution of this appeal, which it is not, we would not consider the arguments addressed in a document absent from the record in this case.

Administrative Law Judge of his jurisdiction over a grazing appeal under 43 U.S.C. § 315h (1988) with respect to issues not properly within the scope of the biological opinion." The same is true with respect to this Board. Therefore, this Board has the jurisdiction to determine whether Judge Heffernan's dismissal of the appeals was correct, because whether OHA has jurisdiction under the Taylor Grazing Act is not within the scope of a biological opinion.

[2] The January 8, 1993, memorandum emanated from OHA's receipt of numerous appeals from BLM grazing decisions implementing FWS biological opinions in which the Appellants asserted that the FWS opinions were arbitrary and capricious and should not have been relied upon by the BLM in its decision-making process. The January 8, 1993, memorandum provides in relevant part that

OHA has no authority under existing delegations to review the merits of FWS biological opinions. Any review of biological opinions would necessarily be limited to the federal district courts pursuant to Section 11(g) of the ESA. * * *

This memorandum does not affect the discretion of Departmental bureaus on how to best implement a biological opinion from FWS. Consistent with case law and the Section 7 regulations, the action agency determines how to implement the opinion, giving due deference to the biological findings of the FWS. The issue is whether OHA, instead of limiting its review to the merits of the BLM decision, should be allowed to look behind that decision and review the merits of the FWS biological opinion. When BLM decides to implement a reasonable and prudent alternative set out in a biological opinion, or if it decides to implement the mandatory terms and conditions of an incidental take statement attached to that opinion, OHA is not authorized to "second-guess" the biological opinion or findings of FWS when reviewing BLM's decision to adopt the measures prescribed in that opinion or advice. As stated above, OHA has not been delegated the authority to carry out such a review.

The April 20, 1993, memorandum reaffirmed the jurisdictional limitation, stating that

if [BLM] decides to implement a reasonable and prudent alternative set forth in a FWS biological opinion, or if BLM implements the mandatory terms and conditions of a biological opinion, OHA is not entitled to "second-guess" the FWS in the guise of reviewing the BLM decision. Any review of FWS biological opinions is limited to the federal courts pursuant to the review mechanism created by Congress in section 11(g) of the [ESA]. 16 U.S.C. § 1540(g) [(1994)]. [7/]

7/ The availability of Federal court review effectively refutes the Appellants' claimed deprivation of due process.

Therefore, OHA has not been granted the authority to review the merits of a biological opinion and incidental take statement issued by FWS pursuant to section 7 of the ESA, 16 U.S.C. § 1536 (1994). Southern Utah Wilderness Society, 128 IBLA 52, 60-61 (1993); Lundgren v. Bureau of Land Management, supra, at 248; Edward R. Woodside, 125 IBLA 317, 322-24 (1993). However, OHA does have jurisdiction to review the consistency of BLM's actions with the biological opinion and to address issues outside the scope of the FWS biological opinion. See Southern Utah Wilderness Society, supra, at 61; Lundgren v. Bureau of Land Management, supra.

The Area Manager's decisions underlying these appeals canceled and reissued grazing permits administered under the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315-315q (1994), to include the mandatory terms and conditions set out in the incidental take statement contained in the FWS Biological Opinion. Appeals from adverse grazing decisions are assigned to administrative law judges for hearings conducted in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 554-559 (1994). See 43 U.S.C. § 315h (1994); 43 C.F.R. §§ 4.470-4.478 and 4160.4; Lundgren v. Bureau of Land Management, supra, at 241.

Appellants concede that the terms and conditions incorporated in the new grazing permits mirror the mandatory terms and conditions contained in the incidental take statement and thus do not attack BLM's decisions as being inconsistent with the FWS Biological Opinion. They have raised no issues ancillary to those resolved in the FWS Biological Opinion and incidental take statement, and Judge Heffernan properly dismissed the appeals for lack of jurisdiction. See Lundgren v. Bureau of Land Management, supra, at 247-48.

[3] Judge Heffernan properly dismissed the appeal because he did not have the ability to grant the relief the Appellants were seeking. What they sought would have required him to review the FWS Biological Opinion, and he did not have jurisdiction over FWS biological opinions. Except for a few specific circumstances, this Board will not entertain an appeal when no effective relief can be afforded an appellant. See, e.g., Wildlife Damage Review, 131 IBLA 353, 355 (1994). A well-recognized exception to this rule is that the Board will not dismiss an appeal because no effective relief can be afforded when an issue raised by the appeal is "capable of repetition, yet evading review." In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51, 53 (1990) (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)); see also Bureau of Land Management v. Thoman, 139 IBLA 48, 54 (1997). One aspect of this case falls within this exception.

[4] The ESA directs all Federal agencies to consult with FWS to insure that the agency's action is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(2) (1994). This process is generally referred to, and we have referred to it, as a "section 7 process." The submitting agency determines the exact nature of the proposed action, and is responsible for compiling and submitting the best available scientific data describing the effects of the proposed action on the listed species in its biological evaluation of the proposed action. 50 C.F.R. § 402.14(d).

The court in Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985), describes a three-stage procedure used when undertaking the section 7 process. First, an agency proposing to take an action must determine whether an endangered or threatened species may be present. If such a species is present, the agency must prepare a biological evaluation to determine whether the species is likely to be affected by the action. If the species would likely be affected, the agency must conduct a formal consultation with FWS, resulting in a biological opinion prepared by FWS. See also Conner v. Burford, 848 F.2d 1441, 1451 (9th Cir. 1988).

A preliminary determination must always be made before the Thomas v. Peterson three-step process can be initiated. The agency must determine and define the nature and extent of the Federal action it intends to take.

The initial BLM decision leading to the three-step process and, ultimately, this appeal was made when it defined the nature and extent of the Federal action to be evaluated in the Biological Evaluation of livestock grazing on the Arizona Strip District desert tortoise habitat. This determination took place before BLM determined that an endangered or threatened species might be present, before it prepared the Biological Evaluation, and before it contacted FWS and asked FWS to render a Biological Opinion and incidental take statement. It was this initial determination that eventually defined the parameters of the FWS Biological Opinion and the incidental take statement. The proposed BLM action, as described in the Biological Evaluation, was not a continuation of the then existing grazing practices embodied in the leases and permits in the Shivwits Resource Area. It reflected a BLM decision to change those practices.

There is no question that BLM had proposed the Federal action before FWS issued its Biological Opinion requiring amendment of the leases and permits. It was the proposed Federal action amending the terms and conditions of the grazing permits which prompted the Biological Evaluation and the formal consultation with FWS which resulted in the Biological Opinion. The contemplated Federal action was the imposition of restrictions on grazing on allotments in the Shivwits Resource Area. In the process of determining the form and content of the request for formal consultation BLM prepared a report (the Biological Evaluation) and collected other data (the best available scientific data describing the effects of the proposed action on the listed species). In the normal course of a grazing decision this, together with data and information regarding possible mitigating measures, is the basis for defining the contemplated Federal action and, if necessary, a BLM decision to impose limitations on livestock grazing use. In the case before us, the only way BLM could carry out the Federal action described in its Biological Evaluation was by changing the terms and conditions of existing permits and leases.

It is well settled that the responsibility for formulating the lease restrictions and conditions lies with BLM. In American Motorcycle Association, 119 IBLA 196 (1991), we stated:

In the December 17, 1990, Decision Record denying appellant's application for a [special recreational use permit], BLM responded to the same arguments as those raised by appellant. We agree with BLM's response, which states as follows:

A number of commenters [sic] indicated that the BLM does not have the authority to make a determination on the significance of impacts on the desert tortoise; that only the U.S. Fish and Wildlife Service has the authority and expertise to make determinations of impact to listed species. This comment reflects a misunderstanding of BLM's responsibility under the National Environmental Policy Act of 1969 (NEPA) to make a determination on the significance of impacts of proposed actions. Under the Endangered Species Act of 1973, the U.S. Fish and Wildlife Service is responsible for providing a biological opinion as to whether or not a proposed action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat (see 50 CFR 402.14(g)). The biological opinion required under the authority of the ESA is separate and distinct from the finding regarding the significance of impacts required under the authority of NEPA. The BLM, not the U.S. Fish and Wildlife Service, has the responsibility under NEPA to determine whether or not the impacts of proposed actions involving public lands and resources are significant (40 CFR 1501.4).

Id. at 200.

An important factor when considering the significance of a particular Federal action is the Government's ability to impose mitigating measures to reduce the significance of the impact. In Sierra Club, 104 IBLA 76 (1988), we noted that

[f]urther analysis of seasonal grizzly bear habitat use and informal consultations with FWS were undertaken. As a result, Amoco added additional bear conservation measures to its proposal. An addendum to the [biological assessment] was prepared evaluating the revised proposal and new mitigation measures which resulted in a "no effect" determination (FEIS at E-24).

Id. at 87.

We find the two above-cited cases significant in one very important respect. In the first, the special use permit was denied because "FWS was precluded from issuing a biological opinion assessing the impacts of the proposed 1991 race because appellant failed to furnish the input required of it." American Motorcycle Association, *supra*, at 200. In Sierra Club, *supra*, the lessee was able to propose mitigating measures which eventually resulted in a "no effect" determination. In both cases, the importance of the surface user's participation in the act of defining the Federal action being proposed and in the act of gathering the best available scientific data describing the effects of the proposed action on the listed species was recognized and stressed. In fact, a reading of these cases supports

an argument that if the biological evaluation is prepared without input from and participation by the contemplated users, there is a serious question whether the biological evaluation was prepared using the best available scientific data.

If the biological evaluation contemplates a change in the grazing use requiring modification of a lease or permit, BLM has responsibilities under the Taylor Grazing Act in addition to its duty to assure that the biological evaluation is prepared using the best available scientific data.

The language of the regulations promulgated under the Taylor Grazing Act clearly and forcefully set out those responsibilities.

The authorized officer can modify a grazing permit or lease "[f]ollowing consultation, cooperation, and coordination with affected lessees or permittees, * * *, and the interested public." 43 C.F.R. § 4130.3-3. In addition,

[t]o the extent practical, the authorized officer shall provide to the affected permittees or lessees, * * *, and the interested public an opportunity to give * * * input during the preparation of reports that evaluate monitoring and other data that are used as a basis for making decisions to increase or decrease grazing use, or to change the terms and conditions of a permit or lease.

Id. (emphasis added).

Following the preparation of the reports and data used as the basis for making a decision to increase or decrease the grazing use, or to change the terms and conditions of a permit or lease, the authorized officer is required to issue a proposed decision which "shall be served on any affected * * *, permittee or lessee who is affected by the proposed action, terms or conditions, or modifications relating to * * *, permits * * * or leases." 43 C.F.R. § 4160.1(a). Following receipt of the proposed decision, "any permittee, lessee, or other interested party may protest the proposed decision * * * within fifteen days after receipt" of the proposed decision. 43 C.F.R. § 4160.2. When a protest is filed,

the authorized officer shall reconsider her/his proposed decision in light of the protestant's statement of reasons for protest and in light of other information pertinent to the case. At the conclusion of her/his review of the protest, the authorized officer shall serve his/her final decision on the protestant * * *, and the interested public.

43 C.F.R. § 4160.3(b). Following receipt, the protestant has a right of appeal to an administrative law judge. 43 C.F.R. § 4160.3(c); § 4160.4.

As can be seen, when BLM is formulating the Federal action it contemplates taking in accordance with the Taylor Grazing Act, and the Federal action requires a biological evaluation pursuant to the ESA, BLM must seek input from affected permittees and lessees and the interested public. Following receipt of this input, the proposed decision setting out Federal

action which would necessitate a change in the terms and conditions of a Taylor Grazing Act permit or lease must be served on the affected permittees and lessees, who should be given an opportunity to protest. If a protest is filed, the authorized officer must reconsider the proposed decision in light of the protestants statement of reasons for protest and other information pertinent to the case. At the conclusion of the review of the protest, the authorized officer must serve the final decision on the protestant and the interested public, and BLM must afford an opportunity for an appeal, as provided in 43 C.F.R. § 4160.4. The BLM decision to take the action set out in the biological evaluation was a final appealable decision. The permittees and lessees should have been afforded the opportunity to appeal that decision. 8/ All future action taken in accordance with section 7 of ESA which may result in the modification of a lease or permit issued under the Taylor Grazing Act should be carried out in accordance with the above described procedure.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Heffernan's dismissal order is affirmed.

R.W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

8/ As noted above, the jurisdictional limitation placed on this Board precludes us from affording the relief Appellants seek. However, the Appellants are not precluded from asking BLM to redefine the proposed Federal action and commence a new biological evaluation. During the course of this evaluation BLM should seek input from affected permittees or lessees and the interested public, including input regarding possible mitigating measures applicable to the individual allotments and to the Shivwits Resource Area. Following receipt of this input, a draft biological evaluation should be served on all affected permittees and lessees, who should be given an opportunity to protest. If protests are filed, the authorized officer must reconsider the proposed decision in light of the protestants' statements of reasons for protest and other information pertinent to the case. At the conclusion of the review of each protest, the authorized officer should serve the final decision on the protestant and the interested public, giving them an opportunity for an appeal, as provided in 43 C.F.R. § 4160.3(c). Barring the issuance of a stay, the biological evaluation shall be submitted to FWS together with a request for a renewed formal consultation with FWS. The affected permittees and lessees should also be afforded the opportunity to participate in all aspects of this consultation and the opportunity to submit mitigation measures for FWS consideration.